88-470

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JONATHAN MELIN, SR., *et al.*,
Petitioners,

v.

NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

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QUESTIONS PRESENTED

The trial court acquitted the defendants of charges of truancy citing First Amendment values. The State appealed and the North Dakota Supreme Court reversed the acquittal and remanded for further factfinding.

1. Does the Double Jeopardy Clause prohibit an appeal by the State when a trial court cites First Amendment values when finding a criminal defendant "not guilty"?

2. Has the State of North Dakota adopted the least restrictive means of achieving its interest in accountability for home education?

PARTIES

Petioners are Jonathan Melin, Sr., and Diana Melin. Respondent is the State of North Dakota.

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IN THE SUPREME COURT
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October Term, 1988

JONATHAN MELIN, Sr., et al.,

Petitioners,

v.

NORTH DAKOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Dakota entered in these proceedings on July 21, 1988.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court is unpublished at this time.

It appears in the appendix beginning at 1a. The written decision of the Dickey County Court was entered on September 3, 1987. It is unpublished. It appears in the appendix beginning at 44a.

JURISDICTION OF THIS COURT

Petitioners respectfully show the following as the grounds upon which the jurisdiction of this Court is invoked:

(i) This case seeks review of a final decision of the Supreme Court of North Dakota filed on July 21, 1988. This is a criminal case (truancy).

(ii) Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fifth Amendment to the Constitution of the United States

. . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

Fourteenth Amendment to the Constitution of the United States

. . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

North Dakota Century Code § 15-34.1-03(1)

Compulsory attendance--Exceptions. The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

(1) That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North Dakota in accordance with section 15-41-25 and chapter

15-36, the subjects offered are in accordance with sections 15-38-07, 15-42-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

(2) That the child has acquired the branches of learning taught in the public schools and has completed high school.

(3) That the child actually is necessary to the support of his family, which shall be a question of fact to be determined by the governing board of the district with the approval of the county superintendent of schools, and such determination shall be subject to review by the superintendent of public instruction on appeal.

(4) That the child is in such physical or mental condition as to render attendance or participation in the regular or special education program inexpedient or impracticable. Such condition shall be shown by a declaration of a multi-disciplinary team which includes the director of special education of the special education unit of which the school district of residence is a member, the school superintendent of the child's district of residence, the child's classroom teacher, the child's physician, and the child's parent or guardian."

STATEMENT OF THE CASE

Jonathan and Diana Melin teach their son, Teddy, in their home in Oakes, North

Dakota. Their home school has not been approved by the State of North Dakota, nor is it approvable. Although each parent has a bachelor's degree, to obtain approval the teaching-parent is required to possess a North Dakota teacher's certificate.

Criminal charges of truancy were filed against Mr. and Mrs. Melin on October 2, 1986, when they failed to send their son to the local public schools. The matter was tried in the Dickey County Court on July 8, 1987, before the Honorable Gary D. Neuharth in a bench trial.

At the trial the State's case consisted entirely of a stipulation that the Melins reside within the boundaries of the school district and that they had not complied with the North Dakota compulsory attendance law, N.D.C.C. § 15-34.1-01 with regard to their son, Jonathan Melin,

Jr. (Teddy). The stipulation expressly reserved the issue of whether or not the statute could be constitutionally applied to the Melins.

The Melins presented testimony that they are educating their son as a result of their sincere religious convictions which require them as parents directly to provide the education for their children. The Melins are members of the Faith Baptist Church in Oakes. Mr. Melin is the pastor of the church.

They presented testimony regarding the educational background of each parent. Mr. Melin, who serves as principal of their home school, has a bachelor's degree from Pillsbury Baptist Bible College in Owatonna, Minnesota. Mrs. Melin, who is Teddy's primary teacher, has an Associate of Arts Degree in nursing and a Bachelor of Science

Degree from Pillsbury Baptist Bible College.

They presented substantial testimony regarding the quality of the education that their son is receiving. Inge Pohl, the Director of Education for the Advanced Training Institute of America (ATIA), testified extensively concerning Teddy's education. The Melins are enrolled in ATIA's correspondence program. Mrs. Pohl testified that Teddy is meeting all of the goals of the ATIA program with a high degree of success. Moreover, this success is validated by the standardized achievement test that was administered to Teddy at the end of the 1986-1987 school year. Teddy was given the Stanford Achievement Test for grade 2 and received a composite score in the 85th percentile,

grade equivalent 4.7.[1]

She also testified that ATIA has done studies of the test scores of all children enrolled in its program in grades one through twelve. The composite group scores in every subject area ranged between the 92nd percentile and the 99th percentile on the Stanford Achievement test.

The Melins testified that they were not certified, nor was it pragmatically possible for them to obtain certification in the foreseeable future. They recognized that they would be in conflict with the statutes of North Dakota but sincerely believed that God required them to directly provide a biblically-centered

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[1]His test scores were as follows for the various sub-tests: Total Reading-93rd percentile, 6.4 grade equivalent; Total Listening - 74th percentile, grade equivalent 3.4; Total Math - 87th percentile, grade equivalent, 4.3.

education for their child. They believed that they were required by their religious faith to obey God rather than man under these circumstances.

Counsel for both parties stipulated that the three issues for the trial court to decide relative to the Melins' constitutional claims were: (1) the sincerity of the beliefs of the Melins; (2) whether the state law burdened those beliefs; and (3) whether or not the state was pursuing a compelling state interest by the least restrictive means available.

After taking the matter under advisement, the trial court issued a written opinion on September 3, 1987. The court held that the program which was being provided to Teddy clearly met the state's interest in making him a "viable citizen." App. at 56a. The court also held that the facts demonstrated that Teddy

was being taught by "capable persons." Id. The critical findings of fact by the trial court related to the issue of least restrictive means. That court said:

> The Melins have now raised the least restrictive means analysis on teacher certification to another dimension- the decision also, in part, must focus on the depth, quality and sincerity of their religious beliefs. Since they have proved these aspects, have proved the literacy of Teddy, have proved nothing harmful occurred to the public safety, health or welfare, I find teacher certification not to be the least restrictive means in achieving the state's educational goals when applied to Melins' constitutional rights. It remains the legislative task and prerogative to fashion a remedy that does not unreasonably interfere with the liberty of parents in the education of their children in the expression of constitutional rights. Therefore the complaint must be dismissed.

App. at 60-61a.

On the same day, the trial court filed its judgment which provided in pertinent part, "And the Court having heard the testimony and having issued a

Memorandum Opinion now enters a Judgment of Not Guilty." App. at 62-63a.

The State appealed the judgment on October 1, 1987. The Melins filed a motion to dismiss the appeal on December 16, 1987, arguing that the appeal was prohibited by the Double Jeopardy Clause. The North Dakota Supreme Court issued a ruling on December 30, 1987, that the motion to dismiss would be considered by the court at the time that the appeal would be heard on the merits.

The North Dakota Supreme Court issued its ruling on the merits on July 21, 1988, which inter alia, denied the Melins' motion to dismiss the appeal. The vote of the court was four to one for reversal. The court held that the Double Jeopardy Clause did not prohibit an appeal by the State in spite of the finding of "not guilty." The court

recognized that the resolution of the three prong-test that this Court has announced for free exercise cases requires findings of fact. App. at 12a. However, the court held that "the trial court's determination that there was an unconstitutional infringement of the Melins' right to free exercise of religion was not a resolution of some or all of the factual elements of the offense charged." App. at 14-15a.

The North Dakota Supreme Court relied on United States v. Scott, 437 U.S. 82 (1978) to support its holding that the "not guilty" finding of the trial court was not an acquittal for the purposes of the Double Jeopardy Clause.

The North Dakota Supreme Court then reversed the decision, holding that the trial court erred in determining that the teacher's certification requirement was

unconstitutional as applied to the facts of the Melins' case.[2] The court said the following about remand.

> Our reversal of the trial court's dismissal of the complaint leaves this case in a unique posture because the dismissal occurred after all the evidence had been entered in a trial to the court. If this had been a trial to a jury we would be required to grant a new trial because the jury would have been discharged at the time of the dismissal. However, because this was a trial to the court

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[2]While not formally consolidated, this case was treated as a companion case to North Dakota v. Anderson, and North Dakota v. Dagley. The North Court Supreme Court issued its substantive opinion on the First Amendment issues in the Anderson case and merely cited it as authority in Dagley. In this case (Melin) there was only minimal discussion of the free exercise issues by the court. It again relied on its two-week old decision in Anderson for its First Amendment conclusions.

Counsel for the Melins is also counsel for the Andersons and Dagleys. A joint petition for a writ of certiorari has been filed in those two matters. No. 88-350. Since this case involves substantial Double Jeopardy issues not present in those cases it has been filed separately.

> we remand to the trial court for a determination of guilt or innocence.

App. at 30-31a.

Justice Meschke dissented. Quoting Sanabria v. United States, 437 U.S. 54, 64 (1978), the dissent said:

> It is fundamental that "when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous."

App. at 35a.

The dissent further criticized the majority for "ignor[ing] all affirmative defenses, particularly those based on constitutional freedoms." App. at 39a. The dissent argued that affirmative defenses have traditionally been a part of double jeopardy jurisprudence.

The dissent argued that the correct rule was to "distinguish between substantive determinations about culpability (including those based on affirmative

defenses, particularly constitutional ones such as freedom of religion or speech) and procedural determinations about matters which do not bear on culpability as in Scott and Jenkins." App. at 42a.

Justice Meschke also dissented from the substantive First Amendment holding, citing his dissenting opinion in North Dakota v. Anderson. App. at 43a.

Subsequent to the entry of the North Dakota Supreme Court's decision, the State's Attorney filed a "Motion For Proceedings On Remand" on August 26, 1988. The State has asked the trial court to "issue a Judgment of Guilty and to schedule a sentencing hearing in this matter." App. at 64a.

It is the understanding of the petitioners that the trial court will not act upon this motion until this Court

acts upon this petition.

REASONS FOR GRANTING THE WRIT

I. DOUBLE JEOPARDY PRECLUDES APPEAL AND RETRIAL WHERE THE DEFENDANT WAS ACQUITTED BASED UPON A CONSTITUTIONAL AFFIRMATIVE DEFENSE

The simple facts of this case give rise to immediate concern about double jeopardy. The trial court found the defendants not guilty of criminal charges of truancy, the State appealed, and the state appellate court reversed and remanded for further factfinding proceedings.

It is settled constitutional law that the protection of the Fifth Amendment's Double Jeopardy Clause is fully applicable in state criminal cases. Benton v. Maryland, 395 U.S. 784 (1969). It is equally well-settled that the Double Jeopardy Clause forbids a second

prosecution for the same offense after an acquittal. United States v. Ball, 163 U.S. 662 (1896); Green v. United States, 355 U.S. 184 (1957). This Court has also held that "[w]hen a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose." Smalis v. Pennsylvania, 476 U.S. 140, 145 (1986).

Thus it is obvious that unless there is some exception to these general rules the North Dakota Supreme Court erred in permitting the State's appeal and in reversing and remanding this case for further factfinding proceedings. The North Dakota Supreme Court's conclusion can only be justified if the trial court's finding of "not guilty" can somehow be construed as something other than an acquittal.

It is true that the trial court's acquittal was not based on the elements of the crime of truancy. The trial court treated the contention by the defendants that the statute was unconstitutional as applied to them as an affirmative defense. Having ruled that the evidence sustained the affirmative defense, the trial court entered a finding of "not guilty."

The unique aspect of this case is that the affirmative defense was constitutional in nature. If this was a murder case with a claim of self-defense, or a narcotics case with a claim of entrapment, it would be obvious that a trial court's finding of "not guilty" on one of these issues would be an acquittal for the purposes of the Double Jeopardy Clause. We would submit that the finding of "not guilty" in this case was an

acquittal for double jeopardy purposes. A judgment of "not guilty" based on a finding that it violates the First Amendment to treat the defendant's behavior as criminal is an acquittal within the meaning of the Double Jeopardy Clause.

The majority decision below cited only one case, United States v. Scott, 437 U.S. 82 (1978), to justify its holding that the trial court's verdict was not an acquittal. The essence of the lower court's decision was the following sentence:

> Thus the trial court's determination that there was an unconstitutional infringement of the Melins' right to free exercise of religion was not a resolution of some or all of the factual elements of the offense charged.

App. at 14-15a.

Thus the rule followed by the North Dakota Supreme Court was that the Double

Jeopardy Clause only prohibits retrials if the "not guilty" ruling is premised solely on one of the elements of the crime. Under this rule, any factually based affirmative defense -- insanity, self-defense, etc. -- would be unprotected by the strictures of the Double Jeopardy Clause.

This is the wrong rule. The North Dakota Supreme Court totally misreads this Court's narrow holding in Scott to reach this conclusion. In Scott, this Court considered a case where the defendant moved for dismissal on the ground of preindictment delay. This motion was made both before and during the trial. At the close of the evidence, but before a verdict, the district court granted the motion for dismissal.

This Court held that such a dismissal was not a bar to a retrial. However,

this Court contrasted affirmative defenses and procedural motions to dismiss for the purpose of double jeopardy determinations.

> The defense of insanity, like the defense of entrapment, arises from "the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense," United States v. Russell, 411 U.S. 423, 435 (1973), where other facts established to the satisfaction of the trier of fact provide a legally adequate justification for otherwise criminal acts. Such a finding of fact does "necessarily establish the criminal defendant's lack of criminal culpability" . . . under the existing law; the fact that "the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles," . . . affects the accuracy of that determination, but does not alter its essential character. By contrast, the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation.

437 U.S., at 97-98.

This Court's unanimous opinion in

Smalis v. Pennsylvania, 476 U.S. 140 (1986) made it clear that Scott is to be read narrowly. This Court said:

> United States v. Scott, supra, overrules Jenkins, only insofar as Jenkins bars an appeal by the government when a defendant successfully moves for dismissal on a ground "unrelated to factual guilt or innocence. . . ." Scott, supra, at 99.

476 U.S., at 146, fn. 9.

A constitutional defense that a criminal defendant's acts were not criminal in character because they were protected by the First Amendment is related to the factual guilt or innocence of the defendant. This is especially true when the attack is that the criminal charge is unconstitutional as applied, as opposed to a facial attack. An "as applied" defense requires a finding that the actual behavior of the defendant was constitutionally protected.

A constitutional affirmative defense

such as freedom of speech, press, or religion, is the kind of defense that goes to the heart of culpability. This type of constitutional defense goes to the heart of the character of the action. Just as it is not a crime to kill someone in self-defense, it is not a crime to violate truancy laws if the law violates the First Amendment as applied to the defendant. Yoder did not get off on a technicality -- his behavior was simply not criminal in nature. Wisconsin v. Yoder, 406 U.S. 205 (1972).

The lower court attempted to justify its holding by reasoning that a First Amendment defense was predominately a legal and not a factual defense. App. at 12a. But there is no question that each of the three elements of a free exercise defense as announced in Sherbert v. Verner, 374 U.S. 398 (1963), requires

factual findings. There can be no proof of sincerity, burden, compelling state interest, or least restrictive means unless the trial court delves into facts pertinent to each of these issues.

There can be no claim that the trial judge did not follow the correct legal principles guiding free exercise cases. The trial judge carefully followed the three-part test announced by this Court in Sherbert and its progeny. The North Dakota Supreme Court did not rule that the trial court employed the wrong legal principles, rather it held that the trial court misapplied the legal principles to the facts at hand. Thus we have nothing more than an appellate court second-guessing a trial court as to factual matters. The availability of appellate review would, of course, be different if the verdict had been guilty or if this

had been a civil case, but here the trial court found criminal defendants "not guilty." The ability of any appellate court to dispute the factual determinations of a trier of fact in such circumstances is strictly prohibited by the Double Jeopardy Clause.

The double jeopardy problem is accentuated when considering the nature of the anticipated remand procedure. The North Dakota Supreme Court admitted that if this were a jury trial there would have to be a retrial. App. at 30a. It is clear that the lower court's reversal will "translate into 'further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged.' [United States v.] Martin Linen [Supply Co.], 430 U.S. 564, 570." Smalis v. Pennsylvania, 476 U.S. 140, 146 (1986). This Court has made it

clear that such further proceedings are constitutionally prohibited. Id.

The State's Attorney has asked the trial court to reopen the matter and enter a judgment of guilty. App. at 64a. This flies in the face of the holding in Smalis, where this Court said:

> Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal fact-finding proceedings going to the guilt or innocence violates the Double Jeopardy Clause.

476 U.S, at 145.

Accordingly, even if the trial court reached the wrong conclusion on the free exercise issues, because the verdict of "not guilty" was entered after a full trial, the trial court's acquittal cannot be appealed and further proceedings are constitutionally prohibited.

II. THE TRIAL COURT CORRECTLY HELD THAT THE TEACHER'S CERTIFICATION REQUIREMENT WAS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE STATE'S INTEREST IN EDUCATION

Petitioners contend that not only did the North Dakota Supreme Court err in hearing the appeal of the State, but it reached the wrong decision with regard to the substantive First Amendment issue.

This case was decided as one of a related series of North Dakota criminal prosecutions of home schooling parents. Two other cases, North Dakota v. Anderson, and North Dakota v. Dagley, were decided within days prior to this case by the North Dakota Supreme Court. The decision in the Anderson matter was treated by the lower court as dispositive of the First Amendment issues in each of these cases.

Indeed the First Amendment issues in

each case are identical. Accordingly, a joint petition for a writ of certiorari was filed in Anderson and Dagley. No. 88-350. We will not reiterate at any length the First Amendment arguments set forth in that petition since these matters are interrelated.

With one exception, there is no real dispute as to the application of this Court's free exercise principles as announced in Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. ---, 94 L.Ed.2d 190 (1987). The sole dispute is whether or not the State of North Dakota has adopted the least restrictive means of achieving its interest in educational accountability for home education.

North Dakota stands absolutely alone in requiring parents to have a teacher's certificate as the only means of operating a legal home school. There are thirty states[3] which have adopted sta-

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[3]These states are listed below with their respective dates of enactment: Arizona, Ariz. Rev. Stat. § 15-802, (1982); Arkansas, Ark. Stat. § 80-1503.4, et seq., (1985); Colorado, C.R.S. § 22-33-104.5,(1988); Florida, F.S.A. § 228.041, (1985); Georgia, Geo. Code Ann. § 32-2104(b), (1984); Hawaii, Haw. Rev. Stat. § 248-9 (6), amended by Haw. Dept. of Educ. Regs. 4140.2 (D)(4), (1988); Louisiana, LSA-R.S. § 17:236.1, (1984); Maine, Maine Rev. Stat. Ann. § 5001(2)(D), Me. Dept. of Educ. Regs. Ch. 130, § 2, (1988); Maryland, Ann. Code of Md. § 7-301(a),amended by MD Regs. Code 13A § 10.01, (1988); Minnesota, Minn. Stat. Ann. §120.101, (1987); Mississippi, Miss. Code Ann. § 37-13-91(3)(c), (1982); Missouri, R.S. of Mo. § 167.031, (1986); Montana, Mont. Stat. § 20-5-102 (2) (f), (1983); Nevada, N.R.S. 392.070, (1956), see also Nev. Admin. Code Chap. 392 §§ 2-8, (1984); New Hampshire, N.H. Rev. Stat. Ann. § 193:1, amended by N.H. Regulations and Procedures, ED 315.01-04; New Mexico, N.M.S.A. § 22-1-2(U), and § 22-1-2.1, (1985); New York, N.Y. Education Law § 3204, amended by N.Y. Comp. R. & Regs. 8 § 100.10, (1988); North Carolina, NC Gen. Stat. § 115 C-563 through

tutes or regulations specifically dealing with home schooling since 1956. Not a single state which has adopted a home schooling statute in the past thirty-two years has felt it necessary to require teacher's certification for all families who teach their children at home. Several of these states with new lenient home schooling laws formerly had laws like North Dakota's.[4] That is, their

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565, (1988); Ohio, Ohio Rev. Code § 3321.04(A) (2); (1976); Oregon, O.R.S. § 339.030(6), (1985); Rhode Island, § 16-19-1 General Laws of Rhode Island, (1984); South Carolina, S.C. Ann. § 59-65-40(A), (1988); Tennessee, T.C.A. § 49-6-3050, (1985); Utah, Utah Code Ann. § 53-24-1 (2), (1957); Vermont, V.S.A. Title 16 §166b, (1987); Virginia, Code of Virginia § 22.1-254.1, (1984); Washington, R.C.W. § 28A.27.010 (4), (1985); West Virginia, W.Va. Code § 18-8-1(b), (1987); Wisconsin, Wisc. Stat. § 115.01 (1r), § 118.15 (4), § 118.165 (1), (1983); Wyoming, W.S. § 21-4-101, et. seq., (1985).

[4]See, e.g., Florida, F.S.A. § 232.02 (4) (1982), and Florida Admin. Reg.

laws did not specifically address home schooling, but contained a blanket requirement that all teachers, including those in private schools, possess a teaching certificate. Moreover, all of the remaining states permit home schooling under some other statutory scheme which does not specifically mention "home education" or "home schooling." For instance, in nine states, home schools can legally operate as a private school or religious school which are not required to use certified teachers.[5] The

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6A-1.951 (1974); New Mexico, N.M.S.A. § 22-10-3 (1981); Virginia, Virginia Code § 22.1-254 (1980); Washington, R.C.W. § 28A.27.010 (1980).

[5] These state are: Alabama, Al. Code §16-28-1(2); California, Ca. Ed. Code §48222; Illinois, Il. Code Ann. §26-1; Indiana, Ind. Stat. Ann. §20.8.1-3-17; Kansas, Kan. Stat. Ann. §72-111(a); Kentucky, Kent. Rev. Stat. §159.030(b) or (g); Nebraska, Rev. Stat. of Neb. §79-1701(2)-(4); Oklahoma, Ok. Sat. Ann. Title 70 §10-105(A); and Texas, Tex. Ed.

remaining states all allow home schooling but the conditions vary from state to state.[6] In some of these states, if the curriculum is "comparable" or "equiva-

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Code Ann. Title 2 §21.033(a)(1).

[6] These states are: Alaska,Ala. Stat. § 14.30.010 (b)(1)(C)(10); Connecticut, Conn. Gen. Stat. Ann. § 10-184 [local approval of equivalent instruction]; Delaware, Del. Code § 14-2703 (a) [equivalent instruction]; (6); Idaho Code § 33-202 [comparable instruction]; Massachusetts, Mass. Gen. Laws Ann. Chap. 76 § 1 ; New Jersey, N.J. Stat. Ann. §18A:38-25 [equivalent instruction]; Pennsylvania, Penn. Stat. Ann. Title 24 § 1327; South Dakota, S.D. Comp. Laws § 13-27-3.

Iowa's teacher's certification law Iowa Code § 299.1, has been temporarily repealed by a bill declaring a one-year moratorium on this requirement to permit the legislature to seek a suitable replacement. H.F. 650, 1988 Iowa Laws. Michigan's certification requirement M.C.L.A § 388.553, is no longer being enforced as a result of a court-approved settlement which now permits teacher's merely to have a bachelor's degree. This stipulation is described more fully in the Petition in the Anderson matter.

Pennsylvania's law was declared unconstitutionally void for vagueness on August 23, 1988, in Jeffery v. O'Donnell, __F. Supp.__, (M.D. Pa. 1988).

lent" to that taught in the public schools the home school is "approved." None of these other states have a blanket requirement that all teaching must be done by a certified teacher.

We would submit that if the least restrictive means doctrine is to have any meaning at all, the state with the most restrictive law in the nation on home schooling must fall.

Home schooling is demonstrably successful in the forty-nine states which do not require or enforce a teacher's certification rule. We would suggest that when First Amendment values are at stake, there must be strict judicial scrutiny of the claims of a state that it is educationally necessary to override a family's religious freedom. Wisconsin v. Yoder, 406 U.S. 205 (1972).

Here not one piece of evidence was

introduced by the State to attempt to justify the State's certification rule. There must be an assumption that religious freedom will result in success not failure. It is incumbent upon the State to prove that freedom for families like the Melins will result in failure. Until the State sustains its heavy burden of proving that freedom has failed, a presumption in favor of religious freedom is required by the First Amendment.

The experience of forty-nine other states, and especially the thirty states with specific laws on home schooling, is undisputable evidence that allowing a measure of freedom for home schoolers will not result in educational failure.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgments and opinion of the North Dakota Supreme Court.

September 19, 1988.

Respectfully submitted,

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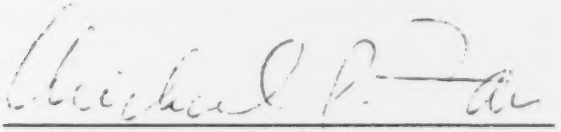
Counsel of Record for Petitioners

CERTIFICATE OF SERVICE

Michael P. Farris, counsel of record for petitioners and a member of the bar of this Court certifies that on this day he mailed by first class mail three copies of the foregoing petition for writ of certiorari to counsel of record for respondents as follows:

James M. Vukelic
Solicitor General
Office of Attorney General
State Capitol
Bismarck, ND 58505

September 19, 1988.



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APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,
Plaintiff and Appellant

v.

Jonathan Melin, Sr., and
Diana Melin,
Defendants and Appellees.

Criminal No. 870290

Appeal from the County Court of Dickey County, the Honorable Gary D. Neuharth, Judge.

REVERSED.

Opinion of the Court by VandeWalle, Justice.

James M. Vukelic, Solicitor General, Office of Attorney General, Bismarck, for plaintiff and appellant.

Michael P. Farris (argued) and J. Michael Smith, Home School Legal Defense Association, Great Falls, Virginia, and Gregory L. Lange, of Richardson, Isakson & Lange, Hazen, for defendants and appellees.

VandeWalle, Justice.

The State appealed from what the trial court termed a "judgment of not guilty," which was entered upon a dis-

missal of a complaint charging Jonathan and Diana Melin with violating the compulsory school-attendance law, Chapter 15-34.1, N.D.C.C. We reverse.

Jonathan and Diana Melin are the parents of Jonathan Melin, Jr. (Teddy). Teddy was seven years of age at the time the complaint in this case was filed. The complaint charged the Melins with failing to send Teddy to a public school pursuant to Section 15-34.1-01, N.D.C.C., without being excused from that requirement as permitted by the statutory exceptions to Section 15-34.1-01.

The Melins had been educating Teddy in their home using a curriculum provided by the Advanced Training Institute of America. Both of the Melins have bachelor's degrees. Jonathan has a bachelor of arts degree in Bible and pastorology, and Diana has a bachelor of science

degree in Bible and nursing. However, neither of these degrees qualified the Melins to teach in North Dakota. See Section 67-02-02-02, N.D. Admin. Code. The Melins therefore were not certified to teach in North Dakota and thus could not comply with the private-school exception to the compulsory school attendance law under Section 15-34.1-03(1), N.D.C.C.[1]

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[1]Section 15-34.1-03(1) provides:

"The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:

> "1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certified in the state of North Dakota in accordance

Prior to trial the Melins and the State entered into a stipulation which provided that (1) the Melins resided within Oakes Public School District and that during the 1986-1987 school year the Melins had violated Section 15-34.1-01, (2) the Melins had been advised of their constitutional rights, including the right against self-incrimination, and that they had been advised of the provision of Title 15-34.1, N.D.C.C., and (3) in return for the State's promise not to subpoena Teddy and its promise to not to object to certain transcribed testimony and test results, the Melins stipulated to (1) and (2) above. Also prior to

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with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws."

trial the Melins submitted a trial brief to the court in which they argued that, among other issues, the requirement that a teacher be legally certified by the State of North Dakota in order that a private-school exception be permitted infringed upon their right to freely exercise their religion provided by the First Amendment to the United States Constitution.

A trial to the court was held on July 8, 1987. At trial the State offered into evidence the stipulation. The State rested and the Melins then testified about their religious beliefs and the educational routine they utilized for teaching Teddy. The Melins introduced evidence through the testimony of Inge Pohl on the curriculum utilized by the Melins and on the educational progress made by Teddy. The Melins also intro-

duced evidence concerning a study performed by the State Department of Public Instruction which considered possible changes in the compulsory school-attendance law, one such change being the requirement of a bachelor's degree rather than a teacher's certificate for the teaching of elementary-age children. No changes were adopted by the Legislature as a result of that study.

At the conclusion of the evidence the court allowed the State time in which to file a reply to the Melins' trial brief, and the court asked both parties to submit written arguments. Subsequently, on September 3, 1987, the court issued a memorandum opinion indicating that the "complaint must be dismissed" because the court found the requirement of teacher certification in the compulsory school-attendance law to be an unconstitutional

infringement of the Melins' right to free exercise of religion. On the same date the court issued a "judgment of not guilty." It is from this judgment that the State appealed.[2]

I

Initially we must consider the Melins' motion to dismiss the appeal. The Melins contend that a decision adverse to them would allow the State to twice place them in jeopardy for the same offense contrary to the directive of the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides that

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[2]Although the State cannot appeal from a judgment [State v. Flohr, 259 N.W.2d 293 (N.D. 1977)], as discussed later in our opinion we consider the effect of this judgment to have been an order dismissing the complaint. An order dismissing a complaint has the same effect as an order quashing an indictment, which is appealable under Section 29-28-07(1), N.D.C.C. Flohr, supra.

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ." It was made applicable to the States through the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The guaranteed consists of three separate constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." [Footnote omitted.] North Carolina v. Pearce, 395 U.S.711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664 (1969).[3] In this case the Melins claim

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[3]We not that the double-jeopardy protection under Article I, Section 12, or the North Dakota Constitution does not intend a result different from the Double

that what the trial court termed a "judgment of not guilty" was an acquittal, and that a reversal of the trial court would subject them to a second prosecution for the same offense following that acquittal. We disagree.

Although the trial court termed its action a "judgment of not guilty," the mere use of those words did not establish the action as an acquittal. As we stated in State v. Flohr, 259 N.W.2d 293, 295 (N.D. 1977):

> "The question of what constitutes an 'acquittal' is not to be controlled by the form of a judge's ruling. United States v. Sisson, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970). Rather, one must look at the substance of the judge's ruling, whatever its label, and determine whether it actually represents a resolution of some or all of the factual elements of the offense

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Jeopardy Clause of the Federal Constitution. State v. Alessi, 216 N.W.2d 805 (N.D. 1974).

> charges. United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)." [Emphasis added.]

See also State v. Hogie, ___ N.W.2d ___ (N.D. 1988). Thus we must look to the substance of the trial court's action to determine whether it was an acquittal.

A review of the trial court's memorandum opinion accompanying the "judgment of not guilty" clearly indicates that the trial court was not resolving "some or all of the factual elements of the offense charged." The memorandum opinion is confined to an analysis of whether the requirement of teacher certification under Section 15-34.1-03(1) unconstitutionally infringed on the Melins' First Amendment right of free exercise of religion. As the trial court stated: "The only real issue in this 'home school' case manifestly remains the

alleged abridgement and infringement of the Melins' rights under the free exercise clause to the First Amendment . . ." The trial court determined that there was an infringement and concluded, "Therefore the complaint must be dismissed." Rather than an acquittal based on some or all of the facts, the trial court was dismissing the complaint because it determined the statutory requirement that a teacher be certified unconstitutionally infringed on the Melins' First Amendment right to the free exercise of religion.

The Melins confuse the factual determination inherent in a constitutional challenge under the Free Exercise Clause of the First Amendment with the determination of some or all of the factual elements of the offense charged which is required for an acquittal. In analyzing a challenge under the Free Exercise of

Religion Clause we consider:

> "(1) whether the activity interfered with by the state is motivated by and rooted in a legitimate and sincerely-held religious belief; (2) whether the parents' free exercise of religion has been burdened by the regulation, and the extent of or impact of the burden on their religious practices; and (3) whether the state has a compelling interest in the regulation which justifies the burden on the free exercise of religion and overrides the interest of the parents in exercising their religious practices. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); . . ." State v. Patzer, 382 N.W.2d 631, 634 (N.D. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 99, ___ L.Ed.2d ___ (1986).

While the questions of whether a statute burdens a person's right to free exercise of religion and whether the State has a compelling interest justifying the burden are questions of law, the question of whether an activity is motivated by a sincerely held religious belief is a question of fact. Attorney General v.

Bailey, 386 Mass. 367, 436 N.E.2d 139 (1982), cert. denied 459 U.S. 970, 103 S.Ct. 301, 74 L.Ed.2d 282 (1982); Roloff Evangelistic Enterprises v. State, 556 S.W.2d 856 (Tex. Civ.App. 1977), appeal dismissed 439 U.S. 803, 99 S.Ct. 58, 58 L.Ed.2d 96 (1978); People v. Mullins, 50 Cal.App.3d 61, 123 Cal.Rptr. 201 (1975). Thus, when the trial court considered whether the Melins' actions were motivated by a sincerely held religious belief, it was making a factual determination.

However, the factual determination which is critical to an acquittal concerns the facts relating to some or all of the elements of the offense charged. State v. Flohr, supra. Our statute defines the elements of an offense as:

> "a. the forbidden conduct; b. the attendance circumstances specified in the definition and grading of the offense; c. the required culpability; d. any

> required result; and e. the non-existence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue." Sec. 12.1-01-03(1), N.D.C.C.

The Melins argue that their free-exercise-of-religion claim was a defense. However, a review of the comments to the corresponding provision to Section 12.1-01-03(1) in the proposed Federal Criminal Code from which our statute is derived [see State v Trieb, 315 N.W.2d 649, 657, footnote 9 (N.D. 1982)] reveals that the defenses referred to by Section 12.1-01-03(1) are those denominated in Title 12.1-05, N.D.C.C. See also State v. Dilger, 338 N.W.2d 87 (N.D. 1983). Thus the trial court's determination that there was an unconstitutional infringement of the Melins' right to free exercise of religion was not a resolution of some or all of the factual elements of

the offense charged.

Our conclusion that the factual determination made by the trial court when it decided the Melins' free-exercise-of-religion claim and dismissed the complaint was not an acquittal is supported by the United States Supreme Court decision in United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). In Scott the Court considered whether the Double Jeopardy Clause would prevent the retrial of a defendant whose motion to dismiss the indictment against him (made before and during trial) was granted but was reversed on appeal. The indictment against the defendant was dismissed by the trial court at the conclusion of all the evidence on the basis that the defendant had been prejudiced by a pre-indictment delay. That was the basis of the defendant's motions made

before and during trial. The Court held in Scott that the Double Jeopardy Clause would not serve as a bar to retrial if the trial court's decision was reversed.

In reaching that decision the Court overruled its decision in United States v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975). In Jenkins, the Court had held:

> "whether or not a dismissal of an indictment after jeopardy had attached amounted to an acquittal on the merits, the Government had no right to appeal [the Government's right to appeal was set forth in 18 U.S.C. § 3731 which allowed the Government to appeal in criminal matters except where the Double Jeopardy Clause would prohibit further prosecution], because 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.'" [Footnote omitted.] Scott, 437 U.S. at 86, 98 S.Ct. at 2191, 57 L.Ed.2d at 71, quoting Jenkins, 420 U.S. at 370, 95 S.Ct. at 1013, 43 L.Ed.2d at 259.

Thus under Jenkins, double jeopardy occurred whenever any resolution of factual issues related to the elements of the offense charged would be necessary upon reversal. The Court in Scott decided that this definition was too broad; instead, it reasoned that an acquittal for purposes of the Double Jeopardy Clause occurs only when the trial court has resolved some or all of the factual elements of the offense charged:

> "Despite [Scott's] contentions, an appeal is not barred simply because a ruling in favor of a defendant 'is based upon facts outside the face of the indictment,' or because it 'is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged.' Rather, a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor] correct or not, of some or all of the factual elements of the offense charged.'" [Citations omitted; emphasis added.] 437 U.S. at 96-97, 98 S.Ct. at 2196,

57 L.Ed.2d at 77.

The Court in Scott determined that there had been no acquittal even though the trial court had made a factual determination concerning the length of the pre-indictment delay. Similarly, there was no acquittal in this case even though the trial court made a factual determination concerning whether the Melins' actions were motivated by a sincere religious belief.

We conclude that the Double Jeopardy Clause would not bar further proceedings against the Melins should we reverse the decision of the trial court. Therefore, we decline to dismiss the appeal on the basis that it would violate double jeopardy.

II

Secondly, the Melins assert in their motion to dismiss the appeal that the

State has not statutory basis to appeal the trial court's decision. We disagree.

In a criminal action the State has only that right of appeal which is provided by statute. State v. Borden, 316 N.W.2d 93 (N.D. 1982). In this case the State contends that its right of appeal is provided by Section 29-28-07(1), N.D.C.C. That section provides that the State may appeal from "An order quashing an information or indictment or any count thereof."

The State's position is that although the trial court termed its action a "judgment of not guilty" it was not acquitting the Melins but rather the trial court was dismissing the complaint against the Melins because it believed the statutory requirement of teacher certification unconstitutionally infringed upon the Melins' right to free

exercise of religion. As we discussed in the previous section we agree with the State's analysis of the trial court's action; what the trial court termed a "judgment of not guilty" was actually a dismissal of the complaint.

This court has previously held that an order dismissing a criminal complaint is equivalent to the quashing of a complaint, and thus orders dismissing complaints are appealable under Section 29-28-07(1). State v. O'Boyle, 356 N.W.2d 122 (N.D. 1984); State v. Teigen, 289 N.W.2d 242 (N.D. 1980); State v. Hanson, 252 N.W.2d 872 (N.D. 1977). Thus the trial court's dismissal of the complaint is appealable by the State under Section 29-28-07(1). Therefore, we decline to

dismiss the appeal.[4]

III

We now turn to the merits of this appeal. The State contends that the trial court's dismissal of the complaint was based on an erroneous conclusion, i.e., that the provision of Section 15-34.1-03(1) requiring that when a child is taught outside the public school system that child must be taught be a person legally certified to teach in North Dakota, unconstitutionally infringed on the

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[4]In their motion to dismiss this appeal the Melins also argued that Section 29-28-35, N.D.C.C., limits the power of this court to review the trial court's decision. That section provides that in an appeal taken by the State this court may not reverse a judgment or modify a judgment so as to increase the punishment. However, as we have previously discussed, the trial court's designation of its action as a "judgment of not guilty" was actually a dismissal of the complaint. Thus no judgment exists in this case and therefore Section 29-28-35 plays no part in the resolution of this case.

Melins' right to free exercise of religion as guaranteed by the First Amendment to the United States Constitution.

We noted above that when a court analyzes a challenge to a statute under the Free Exercise of Religion Clause it must consider:

> "(1) whether the activity interfered with by the state is motivated by and rooted in a legitimate and sincerely-held religious belief; (2) whether the parents' free exercise of religion has been burdened by the regulation, and the extent of or impact of the burden on their religious practices; and (3) whether the state has a compelling interest in the regulation which justifies the burden on the free exercise of religion and overrides the interest of the parents in exercising their religious practices. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); . . ." State v. Patzer, supra.

In Patzer, we rejected a challenge to the requirement of teacher certification, finding certification to be constitution-

al when analyzed under a free-exercise-of-religion claim.

In this case the State conceded that the Melins are motivated by a sincerely held religious belief. In deciding those beliefs Jonathan Melin testified that it is his religious belief that a child's father has the ultimate responsibility for educating his children, stating, "The scriptures do dictate that every father is to be the one who is to oversee and to control and be responsible for the education of their children." Mr. Melin also testified that it would be his right to delegate this educational responsibility to a public school. However, he testified that he had not chosen to delegate this responsibility, and described his reasons as follows:

> "First of all in the reading that I have done and the research that I have done from a purely aca-

> demic standpoint, I've come to the conclusion from this research that home education, purely educationally speaking, is the very best type of education that you can give. Because the education on a tutorial approach, a one on one or one on two or ultimately in our family, one on five, is so much better and so much more easily to be streamlined to be able to fit the specific needs of the children as opposed to a classroom type of atmosphere. No. 2, from a religious standpoint, I believe it's my responsibility to train my children in God's ways because of by stating that God's word is truth. And thirdly, that it's also my responsibility to protect my children of those things which would be harmful to them."

Mr. Melin went on to describe the things which would be harmful to his children as the effects of peer dependency, or, as the trial court termed it, "peer socialization." Mr. Melin described peer dependency as the process whereby a child gives more attention to the beliefs of his friends than to the beliefs of his parents. Diana Melin testified that she

shared the religious beliefs of her husband relating to home schooling.

This description of religious belief is similar to the religious belief held by the defendants in Patzer. Because the Melins' religious belief is similar to the religious belief of the defendants in Patzer, the burden placed on that belief by the requirement of teacher certification is also similar. Thus our decision in Patzer controls the outcome of this case.

In Patzer we concluded that the requirement that when a child is educated outside the public school system that education must be conducted by a person certified to teach in North Dakota, did not unconstitutionally infringe upon the defendants' right of free exercise of religion because the State has a compelling interest in the education of chil-

dren. In reaching that decision we noted that when the State has a compelling interest which would justify the burden placed on the free exercise of religion, in order to be constitutionally acceptable that interest must be furthered by means which are the least restrictive to the free exercise of religion. Our analysis of the least-restrictive-means test in Patzer led us to conclude that:

> "Teacher certification appears to us to be among the least personally intrusive methods now available to satisfy the state's prime interest in seeing that its children are taught by capable persons." 382 N.W.2d at 639.

In attempting to differentiate this case from Patzer the Melins argue that since our decision in Patzer new evidence has been discovered which indicates that teacher certification is not the least restrictive means available to further the State's compelling interest in the

education of children. The Melins note that since Patzer was decided the Department of Public Instruction has studied various alternatives to teacher certification. The Melins argue that this indicates that teacher certification does not meet that part of the compelling-State-interest test which requires that the statute in question utilize the least-restrictive alternative. See Patzer, 382 N.W.2d at 636. We recently rejected an identical argument in State v. Anderson, ___ N.W.2d ___ (N.D. 1988).

It is of greater import that the Legislature declined to adopt legislation including parts of those alternatives when they were submitted to it at the 1987 legislative session. This seems to indicate that the Legislature did not believe that the alternatives would adequately serve to protect the State's

interest in the education of children. While the Legislature is not the final arbiter of what is constitutionally permissible, that being the duty of this court, the Legislature must ensure that the State's interest in the educational progress of all children within the State is protected. Thus our decision is influenced by our previous statement that:

> "The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality. Although North Dakota's minimal requirements for state approval of a private or parochial school may be imperfect, without the regulations the state would have no reasonable assurance that its recognized interest in providing an education for its youth is being protected. In time, other means of assuring quality education under circumstances which provide safety and health may evolve, but until such time, this means appears to be proper." State v. Shaver, 294 N.W.2d 883, 900 (N.D. 1980).

We continue to believe that the State

has compelling interest in ensuring that when public or nonpublic education occurs that it is conducted by persons who are knowledgeable and who are able to impart that knowledge in a manner conducive to a child's education. "Although certification is not a guarantee of teacher competence, logic and experience indicate that it furthers that goal." Sheridan Road Baptist v. Department of Educ., 426 Mich. 462, 396 N.W.2d 373, 396 (J. Boyle concurring) (1986), cert. denied ___ U.S. ___, 107 S.Ct. 2183, ___ L.Ed.2d ___ (1987). See also Johnson v. Charles City Comm. Schools Bd., 368 N.W.2d 74 (Iowa 1985), cert. denied ___ U.S. ___, 106 S.Ct. 594, ___ L.Ed.2d ___ (1985); State, Etc. v. Faith Baptist Church, Etc., 207 Neb. 802, 301 N.W.2d 571, appeal dismissed 454 U.S. 803, 102 S.Ct. 75, 70 L.Ed.2d 72 (1981); Fellowship Baptist

Church v. Benton, 620 F.Supp. 308 (D.C. Iowa 1985), affirmed in part 815 F.2d 485 (8th Cir. 1987). Therefore, we reverse the trial court's dismissal of the complaint based upon the conclusion that the requirement of teacher certification unconstitutionally infringed upon the Melins' right to free exercise of religion under the First Amendment to the United States Constitution.

Our reversal of the trial court's dismissal of the complaint leaves this case in a unique posture because the dismissal occurred after all the evidence had been entered in a trial to the court. If this had been a trial to a jury we would be required to grant a new trial because the jury would have been discharged at the time of the dismissal. However, because this was a trial to the court we remand to the trial court for a

determination of guilt or innocence.

Our remand is similar to the action of the Supreme Court of Massachusetts in Commonwealth v. Babb, 389 Mass. 275, 450 N.E.2d 155 (1983). In Babb the defendant was charged with vehicular homicide. Prior to a trial to the court the parties entered into a stipulation which provided that (1) the defendant operated the vehicle, (2) operation of the vehicle was done in a negligent manner, and (3) a death was cause by that operation. Subsequently, after the conclusion of the evidence, the trial court dismissed the complaint and adjudicated the defendant not guilty because the State had failed to follow the procedural requirements for the filing of a complaint in a vehicular homicide case. On appeal the trial court's decision was reversed. After noting the unique posture of the case the

court remanded it to the trial court because nothing remained to be done except for the judge to decide the case. 450 N.E.2d at 161.

We conclude that what the trial court termed a "judgment of not guilty" was actually a dismissal of the complaint, and that it must be reversed.

Gerald W. VandeWalle
Beryl J. Levine
H.F. Gierke, III
Ralph J. Erickstad, C.J.

Meschke, Justice, dissenting.

I respectfully dissent.

There is not statutory authority for the state to appeal from a judgment of acquittal in a criminal case. NDCC 29-28-07(1) authorizes an appeal by the prosecution only from "an order quashing an information or indictment or any count thereof." Here, a judgment of acquittal

was entered at the end of a complete trial at which Melins offered extensive evidence about their defense of freedom of religion under the First Amendment. There was no order "quashing," or even dismissing, the information or indictment. While a trial court's characterization cannot control, neither should an appellate court's convenient reconstruction. See State v. Hogie, ___ N.W.2d ___ (Criminal No. 870246; N.D. 1988) and Smalis v. Pennsylvania, 476 U.S. 140, 144, footnote 5 (1986).

Our statute is unlike the parallel federal statute on criminal appeals. The federal one authorizes an appeal by the prosecution from any decision "dismissing an indictment or information," but goes on to say "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits

further prosecution." 18 U.S.C. § 3731. The majority opinion equates our restricted state statute with the federal version, as amended in 1981, authorizing appeals to the full extent allowable under double jeopardy jurisprudence. See United States v. Scott, 437 U.S. 82, 85 (1978). In my view, this interpretive license extends our statute beyond its expression.

Since there is not statutory basis for appeal of this judgment of acquittal, I would dismiss the appeal.

Ordinarily, we avoid constitutional confrontations where there are appropriate alternative grounds to resolve the case before us. In Interest of Goodwin, 366 N.W.2d 809 (N.D. 1985). But, if this case must be analyzed under the Double Jeopardy Clauses of the United States and North Dakota Constitutions, I also

believe that this judgment of acquittal constitutionally bars a second prosecution. This acquittal was adjudged after a complete trial. It is too facile to analyze the judgment for legal errors and then to conclude that it did not represent "a resolution, correct or not, of some or all of the factual elements of the offense charged."

It is fundamental that "when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." Sanabria v. United States, 437 U.S. 54, 64, 98 S.Ct. 2170, 2179 (1978).

Sanabria, supra, was decided on the same date as United States v. Scott, supra, but is not even mentioned in the majority opinion. In Sanabria, the United States Supreme Court held that the

Double Jeopardy Clause barred a government appeal from a midtrial ruling resulting in the exclusion of certain evidence, which it assumed was erroneous, and from a following judgment of acquittal entered at the end of the trial. Seven justices concurred in that result.

By contrast, Scott allowed the government to appeal from an order granting a defense motion to terminate a trial for preindictment delay, which was done at the close of evidence and before a verdict. Like Jenkins, which it overruled, the dismissal was based on a reason of procedural fairness prior to trial. Even then, only five justices concurred and four dissented.

That Scott does not go as far as it is applied in the majority opinion was explained in Smalis v. Pennsylvania, 476 U.S. 144-146:

"The Pennsylvania Supreme Court erred in holding that, for purposes of considering a plea of double jeopardy, a defendant who demurs at the close of the prosecution's case in chief 'elects to seek dismissal on grounds unrelated to his factual guilt or innocence.' (citation omitted). What the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt. Our past decision, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause. See, e.g., United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Sanabria v. United States, 437 U.S. 54 (1978). United States v. Scott does not overturn these precedents; indeed, it plainly indicates that the category of acquittals includes 'judgment[s] . . . by the court that the evidence is insufficient to convict.' 437 U.S., at 91.

* * * *

". . . [T]he Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into '"further proceedings of some sort, devoted to the resolution

> of factual issues going to the elements of the offense charged."' Martin Linen, supra, at 570." See also footnote 9, 476 U.S. at 146.

Melin's situation is more analogous to that in Finch v. United States, 433 U.S. 676 (1977), a per curiam opinion which was not overturned by Scott. In Finch, after considering stipulated facts "and reviewing the applicable treaties" bearing on the charged offense of hunting on Indian lands, the trial court dismissed the charge for failure to state an offense. The Court of Appeals considered the appeal and reversed because it believed that no further factual inquiry was required in the trial court when its legal conclusions were incorrect. The United States Supreme court vacated the action by the Court of Appeals and directed that the appeal be dismissed, saying:

> "Absent a plea of guilty or nolo contendere, see Fed. Rule Crim. Proc. 11, a verdict or general finding of guilt by the trial court is a necessary predicate to conviction. See Rule 23(c). Because the dismissal was granted prior to any declaration of guilt or innocence, 'on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged,' Lee, supra, at 30, we hold that the Government's appeal was barred by the Double Jeopardy Clause." 433 U.S. at 677.

The majority analysis in this case ignores all affirmative defenses, particularly those based on constitutional freedoms. See NDCC 12.1-01-03(3). The effect of the majority ruling is to remove affirmative defenses from the purview of the Double Jeopardy Clauses and relegate them to some inferior status. Traditionally, affirmative defenses have been recognized as a part of double jeopardy jurisprudence. 21 Am. Jur.2d Criminal Law § 183 (1981); 75 Am. Jur.2d

Trial § 425 (1974). No explanation is suggested for why they are now left out of consideration. An acquittal based upon an affirmative defense should not be subjected to judicial redetermination on appeal when, as here, it involves culpability. See United States v. Ballard, 322 U.S. 78 (1944) (freedom of religion defense) and Burks v. United States, 437 U.S. 1 (1978) (insanity defense).

The thin majority in Scott did not rule out the role of affirmative defenses in determining culpability. Scott recognized that justification defenses affecting culpability call for a different analysis than used in Scott. Thus, the majority opinion in Scott said:

> "The defense of insanity, like the defense of entrapment, arises from 'the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense,' United

> States v. Russell, 411 U.S. 423, 435 (1973), where other facts established to the satisfaction of the trier of fact provide a legally adequate justification for otherwise criminal acts. Such a factual finding does 'necessarily establish the criminal defendant's lack of criminal culpability,' post, at 106 (BRENNAN, J., dissenting), under the existing law; the fact that 'the acquittal may result from erroneous evidentiary ruling or erroneous interpretations of governing legal principles,' ibid., affects the accuracy of that determination, but it does not alter its essential character. By contrast, the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation." United States v. Scott, 437 U.S. 82, 97-98 (1978).

In dissent, Justice Brennan confirmed that the majority opinion recognized affirmative defenses bearing on culpability, but criticized the failure of the majority opinion to offer any "satisfactory explanation for the difference in

treatment" for a defense based on procedural fairness.

Thus, I submit, we should distinguish between substantive determinations about culpability (including those based on affirmative defenses, particularly constitutional ones such as freedom of religion or speech) and procedural determinations about matters which do not bear on culpability as in Scott and Jenkins. In my view, this case involves substantive considerations of culpability like Sanabria and Finch, and unlike Scott and Jenkins.

As said in Green v. United States, 355 U.S. 184, 187-188 (1957), the "underlying idea" of the Double Jeopardy Clause

> "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to

> live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

To me, those reasons resonate here. They are emphasized by the awkward problem of disposition on remand in this case, exemplified by the lack of a clear direction in the majority opinion. Therefore, I also respectfully dissent on Double Jeopardy grounds.

Finally, I also respectfully dissent from the substantive holding on freedom of religion for the reasons given in my recent dissenting opinion in State v. Anderson, ___ N.W.2d ___ (Criminal No.s 870261-62; N.D. 1988)

Herbert J. Meschke

STATE OF NORTH DAKOTA
IN COUNTY COURT
COUNTY OF DICKEY

Before Hon. Gary D. Neuharth, Judge

State of North Dakota,
Plaintiff,

vs.

Jonathan Melin, Sr. and Diana Melin,
Defendants.

Criminal No. 376

Memorandum Opinion

The Melins have not enrolled their son, Teddy, in public, private or parochial school. Consequently, the Melins have been charged by criminal complaint of being in violation of North Dakota's compulsory school attendance law. Chapter 15-34.1, N.D.C.C. However, the Melins claim a constitutional right protected by both the free exercise clause of the First Amendment to the United States Constitution and Article I of the North Dakota Constitution which prevails

upon the government to allow "home schooling" of their children. The government, of course, defends the regulation imposed - teacher certification (which does indeed burden the practice of the religious beliefs held by the Melins), but the government insists upon a balance of interest, the requirement is . . . reasonably narrow one and amply justified." Patzer.

Our federal and state courts recognize the power of government to reasonably regulate all schools whether public, private, parochial or "home." The rationale has been succinctly stated in Rivinius, "the state has a compelling interest in requiring minimum standards of education to insure adequate education of the children of the state to enable them to become viable citizens in the community." The government also resists

any equal protection or due process claims the defendants raise and this Court concurs with those government contentions. Fellowship Baptist Church concludes teacher certification does not advance or inhibit religion nor does it foster any excessive government entanglement. This same Court also found no merit in the defendants' claimed violations of their due process rights; and school boards were found to have no real financial purpose or incentive in their implementation of the compulsory school attendance law. Furthermore, any financial consideration the parents may have which limit their ability to pay for an education is not discriminatory nor a classification factor based upon wealth- not a violation of equal protection. Harris v. McRae. The only real issue in this "home school" case manifestly re-

mains the alleged abridgment and infringement of the Melins' rights under the free exercise clause to the First Amendment and Article I. A latent issue also remains to be decided - this issue is whether or not the teacher certification requirement is a reasonable government regulation.

To begin the inquiry the focus of the teacher certification requirement seems to be the assurance of teacher competency/ability and of student intellectual response and growth. However, many school authorities, the defendants' expert witness, some legislators and many court opinions indicate teacher certification alone does not correlate to these objectives. Patzer could only emphasize that at least teacher certification insured exposure to an education curriculum. In other words the desire of the

government to produce "viable citizens" in home school situations by strict compliance to teacher certification could be argued as fallacious and specious.

The academic focus of the Melins places a "core program of scripture" as the foundation of the learning experience. From the "word of God" they have enrolled the entire Melin family in a nation-wide home schooling program. Application and fees are necessary. Acceptance including re-enrollment is not automatic. In fact, families must attend pre-school seminars as well as continuing evaluation programs before and during their enrollment. Students are also pre and post tested. This particular program of home schooling demands rigorous compliance with teaching methodology and "spiritual faith." Parents as teachers and student progress is checked, moni-

tored and evaluated.

The administrators of this program have professional teaching backgrounds with classroom experience in the elementary, the high school, the college and post graduate levels. In the design and the implementation of this program accountability has been emphasized. Independent evaluations have measured student achievement and the program evaluators used standardized testing formats found throughout the United States and used by private and public schools. Even though the paramount goals of the program the Melins are currently enrolled in are indeed "spiritual," the educational goal parallels the government rationale and law. In compliance with their program and in deference to government, Teddy has been tested and ranks in the 85th percentile nationwide and at the fourth grade

seven month level as an individual. "Spiritually" the Melins testify all expectations have been "super[c]eded."

Jon Melin is pastor at the Faith Baptist Church in Oakes. Jon received a B.A. Degree in Bible and Pastorology from Pillsbury Bible Baptist College. His religious beliefs and sincerity are beyond question or reproach. His commitment to Teddy's education is admirable.

Diana Melin is the primary teacher for Teddy. She has an A.A. Degree in Nursing, two years of Bible and has been awarded a B.S. in Bible and Nursing from Pillsbury. Her teaching schedule demands time, skill and devotion. So to[o]] her religious beliefs and sincerity are beyond question or reproach.

Diana summarizes the Melin family goals: Life goals; academic - to help society, to work, to help the Lord;

spiritual - to be tender and to live God's word. Jon would summarize the family goals as "to function in God's role for them."

The Melins castigate the public school only in the relationship to Teddy. "Peer socialization" after three weeks of public school kindergarten forced a "tremendous behavioral change in Teddy" from obedience to rebellion, from spiritual inspiration to rejection. All, of course, to the chagrin of the Melins. By home schooling and enrollment in this program, Jon avoids the peer oriented misbehavior he found in the public school setting and as he testified, "God would have us in this program." Incidentally, the Melins do not challenge all government authority; rather they recognize "God has set up legal authority." But by home schooling the Melins simply contend

they are within their First Amendment and Article I rights while "following the word of God." In obedience to the legal authority the Melins do not object to state inspections of their school nor to the basic required curriculum found in the public school system.

When asked about the socialization process of being enrolled in a public school the Melins said they understood the importance of positive peer group relationships. To foster these relationships the Melins involve their children in their role of pastor and wife including church ministery by visits to adults and children of all ages. They also invite children to visit and play in the Melin home and yard.

The defendants' expert witness referred to earlier is Inge Pohl, the Education Director for the program the

Melins have enrolled in. Ms. Pohl is a professional educator holding a current Illinois teaching certificate. She also has a minor graduate degree in Educational Statistics and Measurement. Ms. Pohl helped design this home schooling program and she implements various facets. She also stresses accountability and strict compliance by parents with program requirements. By research and experience she makes these observations: there is no significant correlation between parent's educational level and student achievement. There is no significant correlation between teacher certification and teaching ability. She does admit some teaching method courses may be helpful - especially for classroom management and for large groups.

Ms. Pohl testified that she had found no research critical of home schooling

and cites the "Alaska study" as outstanding. As the Melins do, Ms. Pohl also seeks state approval of her program. Indeed, the Melins discussed their home schooling program, the curriculum and Teddy's progress with the superintendent of the Oakes Public School system and invited the school administration to visit within the Melin household. No one did visit. The Melins would have made available all homestudy program material including daily work, progress and evaluation reports and all testing information.

To iterate does the compelling state interest - education of children - in this case justify the burden - teacher certification - of the Melins' free exercise of religion and profession of faith. Has the state in this case demonstrated the unavailability of a less restrictive means in the achievement of

its aims. Has the state in this case shown teacher certification is necessary to prevent illiteracy - the command found in Article VIII, Section 4 of the North Dakota Constitution. As distinguished from other cases the Melins have pre and post tested Teddy. All materials used in evaluating student progress is available for state inspection. Standard achievement scores parallel those of the public schools. With the exception of the parents who as non-certified teachers teach and of the "spiritually" based curriculum the Melins home school setting does not appear much different from the learning process of the private or public school systems. The Melins believe in education, in responsible citizenship and in the legal duties of parents. As the Melins testify the expression of their first amendment rights and their profes-

sion of faith would be completely nullified by the requirement of teacher certification. Jon would not delegate his "biblical command" to any person and it would be virtually impossible for him to become certified.

In Patzer, the State's prime interest seems to have meandered from the "viable citizen" rationale of Rivinius to a more perhaps nebulous standard of "being taught by capable persons." As previously discussed teacher certification does not correlate well to teaching ability. Hence the "capable persons" standard becomes another convoluted point of argument. The Melins have proved Teddy is being educated within our society's expectations - he is becoming a "viable citizen." The Melins have proved themselves to be "capable persons" - they have successfully taught Teddy and have

been accepted for re-enrollment. Jon and Diana attend program seminars in teaching methodology.

Nevertheless, on similar facts the Patzer court still found teacher certification justified (The Patzers and Larsens were highly educated people - Tom Patzer is a Seventh Day Adventist Pastor with a Masters of Divinity Degree, Ray Larsen is an opthamologist [ophthalmologist], a medical doctor. Apparently the home schooling course of study used was found to be adequate. The Patzer court found no merit in testing as a least restrictive means in producing "viable citizens" by "capable persons." The Patzer court also found no merit in educational equivalency statues [statutes], since these could actually be considered more restrictive or intrusive).

Also, as previously discussed above,

the Defendants' various arguments presented in a shot gun blast approach (this often dilutes the poignancy) appear redundant and superfluous in light of Patzer and the other cases cited. But their argument to review the least restrictive means analysis has some vitality. As the Patzer court said, "Teacher certification appears to us to be among the least personally intrusive methods now available . . ." What was available during Patzer may be different in deciding Melin. The Defendants urge this Court to consider the "baccalaureate" statement of Dr. Wayne Sanstead, State Superintendent of D.P.I., pre and post testing, family enrollment, accountability of the program and program design in the determination of the least restrictive means. The Defendants also urge this Court to consider Article I and

Article VIII of the North Dakota Constitution in establishing that as applied to them the North Dakota compulsory school attendance laws unconstitutionally infringe upon their religious beliefs (The method of teaching and course content in the Melin home school does, serendipitously, comply with the requirement of Article VIII, Section 3 of the North Dakota Constitution, teaching ". . . truthfulness, temperance, purity, public spirit and respect for honest labor of every kind").

The Preamble and Article I, Section 1 grant to the people "liberty," a power of personal choice. Section 3 grants to the people "the free exercise and enjoyment of religious profession and worship," other powers of personal choice. Article VIII Section 1, 2, 3 and 4 reveal the state's compelling interest in the

education of its children. And although the right to believe in [is] absolute, the right to act upon those beliefs may be subject to reasonable government regulation. So to [too] the issue remains-can the state's compelling interest be satisfied without the teacher certification requirement. Rivinius said no even in consideration of the United States and North Dakota Constitution.

But the Defendants have persuasively testified to their religious convictions and beliefs. The sincerity of those convictions and beliefs make the practice of their faith and the education of their children inseparable and interdependent. The Melins have now raised the least restrictive means analysis on teacher certification to another dimension - the decision also, in part, must focus on the depth, quality and sincerity of their re-

ligious beliefs. Since they have proved these aspects, have proved the literacy of Teddy, have proved nothing harmful occurred to the public safety, health or welfare, I find teacher certification not to be the least restrictive means in achieving the state's educational goals when applied to Melins' constitutional rights. It remains the legislative task and prerogative to fashion a remedy that does not unreasonably interfere with the liberty of parents in the education of their children in the expression of constitutional rights. Therefore the complaint must be dismissed.

Dated this 3rd day of September, 1987.

Gary D. Neuharth, County Judge

STATE OF NORTH DAKOTA
IN COUNTY COURT
COUNTY OF DICKEY

Before Hon. Gary D. Neuharth, Judge

State of North Dakota,
Plaintiff,

vs.

Jonathan Melin, Sr. and Diana Melin,
Defendants.

Criminal No. 376

JUDGMENT

After the entry of plea of NOT GUILTY to the charge of Violation of the Compulsory School Attendance Law of North Dakota in violation of Section 15-34.1-01 and 15-34.1-05, N.D.C.C. the above captioned matter came on for hearing before the Court. The State appeared by and through Daniel G. Diemert, Dickey County States Attorney. The Defendants appeared personally and were represented by Gregory Lange, Attorney at Law from Hazen, North Dakota.

And the Court having heard the testimony and having issued a Memorandum Opinion now enters a Judgment of Not Guilty.

Dated this 3rd day of September, 1987, at Ellendale, Dickey County, North Dakota.

BY THE COURT:

Gary D. Neuharth, County Judge

STATE OF NORTH DAKOTA,)
Plaintiff,)
)
vs.)
)
Jonathan Melin, Sr.,)
and Diana Melin,)
Defendants.)

MOTION FOR PROCEEDINGS
ON REMAND

The Dickey County States Attorney moves the Court for further proceedings herein based upon the Judgment issued by the North Dakota Supreme Court dated July 21, 1988.

Particularly the State of North Dakota requests the Court to issue a Judgment of Guilty and to schedule a sentencing hearing in this matter.

DATED this 26th day of August, 1988.

Daniel G. Diemert
DICKEY COUNTY
STATES ATTORNEY

Supreme Court, U.S.
FILED
OCT 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-470

In The

Supreme Court of the United States

October Term, 1988

JONATHAN MELIN, SR., AND DIANA MELIN,
Petitioners,

v.

STATE OF NORTH DAKOTA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

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QUESTIONS PRESENTED

May the State appeal from an order dismissing a criminal complaint even though the order is fashioned a judgment of not guilty?

Does North Dakota's compulsory attendance law unconstitutionally infringe upon petitioners' free exercise of religion?

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STATEMENT OF THE CASE

Jonathan Melin, Sr., and Diana Melin are the parents of Jonathan Melin, Jr. ("Teddy"), who was born May 9, 1979. The family resides in Oakes, Dickey County, North Dakota. North Dakota law provides that parents who have control over an educable child between the ages of 6 and 16 years must send that child to an approved public, private, or home school. Before a school may be approved, the teachers therein must have a state certificate evidencing the fact that they have earned a bachelor's degree, have taken classes in a program of general education, and have completed a student teaching experience. Jonathan and Diana Melin held bachelor's degrees but did not apply for nor receive teacher certificates. They refused to send Teddy to an approved home school, parochial school, or public school.

On October 2, 1986, Mr. and Mrs. Melin were charged with violating North Dakota's compulsory attendance law. On the day before trial, a stipulation was entered into by the Melins and the State of North Dakota. In the stipulation, the defendants admitted violating the compulsory attendance law as alleged in the criminal complaint.

On July 8, 1987, Dickey County Judge Gary D. Neuharth heard testimony proffered by the Melins directed at the constitutionality of the compulsory attendance laws of North Dakota.

At the hearing, Jonathan Melin, Sr., testified he chose to teach Teddy at home for three reasons, two of them secular in nature. He alleged that, first, home education is

superior to education in schools; secondly, home education serves to protect Teddy from peer dependency; and thirdly, his religion requires him to assume the responsibility for training Teddy in God's ways. Diana Melin concurred with these reasons and both she and Jonathan Melin, Sr., testified that their firmly held religious conviction was acquired in 1985. Jonathan Melin, Sr., further testified that he had no religiously based objection to teacher certification but objected to it because of the inconvenience it would cause him to obtain it.

On September 3, 1987, County Judge Neuharth issued his Memorandum Opinion in which he dismissed the criminal complaint. Judge Neuharth concluded that North Dakota's requirement of teacher certification unconstitutionally infringed upon the Melins' right to free exercise of religion under the first amendment to the United States Constitution. Sometime thereafter, Judge Neuharth issued a Judgment backdated to September 3, 1987, in which he found defendants not guilty.

On appeal, the North Dakota Supreme Court determined Judge Neuharth's actions did not constitute an acquittal but rather a dismissal of the criminal complaint. North Dakota's highest court concluded County Judge Neuharth erred when he made the legal conclusion that teacher certification violated the Melins' first amendment rights. The case was remanded to the trial court for a determination of guilt or innocence. If found guilty, the Melins risk having imposed upon them a fine of up to $500, the maximum penalty for an infraction under North Dakota law.

SUMMARY OF ARGUMENT

The county judge did not acquit the Melins but rather, dismissed the complaint against them. Because the county judge did not resolve in the Melins' favor any factual element of the offense charged, appeal by the State did not violate the double jeopardy clause.

The State of North Dakota has a compelling interest in assuring quality education for its citizens. This has been accomplished by laws which only minimally affect the Melins' right to freely exercise their religion. These laws are less intrusive than those of other states. On balance, North Dakota's compulsory attendance laws do not unconstitutionally infringe upon the Melins' free exercise rights.

The Melins' Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE STATE OF NORTH DAKOTA DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE BY APPEALING THE COUNTY JUDGE'S DECISION.

Ordinarily, the prosecution is barred from appealing a judgment of acquittal by the fifth amendment to the United States Constitution which provides in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," U.S. Const. amend. V.

Contrary to the assertion of the Melins, the double jeopardy clause is inapplicable to the facts of this case because there never was an acquittal.

Dickey County Judge Neuharth issued a decision dismissing the complaint and followed that by a Judgment wherein he determined the defendants were not guilty.

The North Dakota Supreme Court correctly concluded that the latter decision by Judge Neuharth was not an acquittal in the legal sense of the word. As this Court has stated:

> What constitutes an "acquittal" is not to be controlled by the form of the judge's action. (Citations omitted.) Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

The double jeopardy clause establishes the fundamental right to keep the decision of the finder of fact only if that decision resolves in the accused's favor a factual element of the offense. *United States v. Scott*, 437 U.S. 82 (1978).

In North Dakota, "element of an offense" has been defined in statute:

> **12.1-01-03. Proof and presumptions.**
>
> . . . .
>
> "Element of an offense" means:
>
> a. the forbidden conduct;

b. the attendant circumstances specified in the definition and grading of the offense;

c. the required culpability;

d. any required result; and

e. the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

The "forbidden conduct" (*see* N.D.C.C. § 12.1-01-03(a)) in this case is set forth in N.D.C.C. § 15-34.1-01 which states:

> **15-34.1-01. Compulsory attendance.** Every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session.

In order to prove the offense charged in the criminal complaint against the Melins, the State of North Dakota had the burden of demonstrating:

1. That the Melins had control over an educable child of an age of 7 to 16 years;

2. That the Melins resided within Oakes Public School District No. 41; and

3. That the Melins failed to send said child to a public school during the entire time such school was in session.

These elements were conclusively proved by way of the stipulation signed by the Melins, their attorney, and

the Dickey County prosecutor. The stipulation stated, in part:

> 1. The defendants, Jonathan Melin, Sr., and Diana Melin, admit that they reside within the exterior boundaries of Oakes Public School District No. 41 and that during the 1986-87 school year they violated Section 15-34.1-01, N.D.C.C., with regards (sic) to their son, Jonathan Melin, Jr.

The stipulation was filed with the court and read into the record before any further testimony at the hearing was taken.

None of the foregoing elements of the offense were resolved in favor of the Melins by Judge Neuharth. Indeed, the county judge did not so much as discuss any of these elements of the offense in his Memorandum Opinion.

The Melins now argue the State failed to prove the nonexistence of a defense, namely their free exercise of religion claim. However, it is clear from legislative history that the defenses referred to by N.D.C.C. 12.1-01-03(1) are only those denominated in N.D.C.C. ch. 12.1-05. N.D.C.C. 12.1-01-03(1) is derived from the proposed Federal Criminal Code. *State v. Trieb*, 315 N.W.2d 649, 657 n.9 (N.D. 1982). The free exercise of religion claim made by the Melins is not a "defense" which has any statutory basis in N.D.C.C. ch. 12.1-05 or anywhere else in the North Dakota Century Code.

Implicit in the Melins' argument is the supposition that a jury can or should decide whether or not their free exercise of religion claim is valid.

In *Dennis v. United States*, 341 U.S. 494 (1951), Dennis appealed his conviction for violating the Smith Act arguing, *inter alia*, the trial court erred in failing to submit to the jury whether or not his conduct created a clear and present danger that it would bring about the substantive evils Congress had a right to prevent.

> The argument that the action of the trial court is erroneous, in declaring as a matter of law that such violation shows sufficient danger to justify the punishment despite the First Amendment, rested on the theory that a jury must decide a question of the application of the First Amendment. We do not agree.
>
> When facts are found that establish the violation of statute, the protection against conviction afforded by the First Amendment is *a matter of law*.

Id. at 513 (emphasis supplied).

In North Dakota, all questions of law are to be decided by the court, not by juries. N.D.C.C. §§ 29-21-03 and 29-21-04.

There are several policy reasons why such issues of law should not be decided by juries and chief among them is the complexity of the analyses involved in first amendment cases.

This is not to say that defendants cannot raise a free exercise of religion claim in the context of a criminal prosecution. Defendants could do so by motion pursuant to N.D. Crim. P. 12(b).

The decision of a trial court judge to dismiss the complaint based upon a free exercise of religion claim is reviewable by an appellate court pursuant to N.D.C.C.

§ 29-28-07(1). *State v. Hanson*, 252 N.W.2d 872 (N.D. 1977); *State v. Howe*, 247 N.W.2d 647 (N.D. 1976).

Since the free exercise of religion claim is a matter of law to be decided by a court, it follows that the State of North Dakota was not required to prove beyond a reasonable doubt the nonexistence of this so-called defense to the finder of fact. Thus, the "constitutional affirmative defense" as the Melins prefer to call it is not an element of the offense with which the Melins were charged.

There was no finding made by the county judge which resolved in the Melins' favor some or all of the factual elements of the offense charged. These realities cannot be changed by the form in which the county judge cast his order and the appeal by the State of North Dakota did not violate the double jeopardy clause of the fifth amendment.

Moreover, several of the major underlying policy reasons for application of the double jeopardy clause do not apply to this case.

These policy reasons were succinctly set forth by Justice Black in *Green v. United States*, 355 U.S. 184 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-188.

Upon remand to the county judge there will be no need for further proceedings devoted to resolution of factual issues going to the elements of the offense charged. *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Those factual issues have long since been resolved by the stipulation which was presented to the county judge. The embarrassment and ordeal associated with a new trial are therefore absent. There will be no continuing state of anxiety and insecurity based upon the possibility that even though innocent, the Melins may be found guilty. They have admitted their violation of the statute.

For the foregoing reasons, the appeal by the State of North Dakota of Judge Neuharth's decision did not violate the double jeopardy clause of the fifth amendment.

II. NORTH DAKOTA'S COMPULSORY ATTENDANCE LAWS, AS APPLIED TO THE MELINS, ARE NOT UNCONSTITUTIONAL.

The first amendment to the United States Constitution preserves to the individual the right to free exercise of religion. The right of belief is absolute, but the right of conduct based upon that belief is not, and can be regulated by the state. *Sherbert v. Verner*, 374 U.S. 398 (1963).

In considering a free exercise claim, it is appropriate to use the three-pronged analysis set forth in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The first prong in this analysis involves proof by the Melins that the State has burdened a sincerely held religious belief which is central to their religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988). The burden then shifts to the State to show that it has a compelling interest which outweighs the Melins' interest in the free exercise of their

religion. The third prong involves a showing by the State that the means by which the compelling State interest is achieved is the least restrictive means available. *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1980).

A. The Melins Failed to Show the State Burdened a Sincerely Held Religious Belief Central to Their Religion.

The Melins' desire to teach their son at home was motivated only in part by a religious belief. Jonathan Melin, Sr., testified that he chose to teach his son at home for three reasons, two of them secular in nature. He believed home education to be superior to education received in schools and he sought to protect his son from peer dependency by educating him at home. His third reason for choosing to educate his son at home was based upon his religious belief that he was required to assume the responsibility for training his son in God's ways. Both Jonathan and Diana Melin testified that they acquired this religious conviction in 1985. The Melins' recent conversion bears no resemblance to the 300 years of consistent religious practice of the Amish discussed in *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

Although the Melins refer to themselves as Christians, Jonathan Melin acknowledged that not all Christians are required by their faith to train their children in their own home. Since the vast majority of all Christians in this country do not educate their children at home and since the Melins have failed to show how their religion differs from that of other Christians, it is difficult to see

how their objection to teacher certification is central to their religion.

The Melins' religious convictions, even if sincerely held, are unlike those of the Amish considered in *Yoder*. The Old Order Amish religion pervaded and determined virtually the entire way of life of the Amish. Their religious beliefs dictated separation from "worldly" influences and this lifestyle had been followed for centuries. *Id.* at 217.

Contrast these beliefs with those recently acquired by the Melins, beliefs which are not shared by any organized group.

The burden upon the Melins' religious beliefs is slight. Both of the Melins are college educated and admitted they have no objection to teacher certification per se. Jonathan Melin, Sr., admitted that if he were qualified to be a certified teacher, he would seek certification immediately. The Melins' objection to certification lies solely in the inconvenience it would cause them to obtain it. Since the Melins already hold bachelor's degrees, it would be necessary only that they take courses in pedagogy and complete a student teaching experience.

At most, the burden upon the Melins' religious conviction is indirect. "In our view, the [teacher] certification requirement can only be viewed as a direct restraint on plaintiffs' free exercise rights if the contention is accepted that all secular regulation of private religious schools violates the first amendment, a conclusion which is unsupported by any previous precedent." *Sheridan Road Baptist v. Department of Education*, 396 N.W.2d 373, 387

n.13 (Mich. 1986), *cert. denied*, 107 S. Ct. 2183 (1987) (Boyle, J., concurring).

The burden upon the Melins is clearly distinguishable from the burden on the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Testimony in *Yoder*, cited by this Court, was given that compulsory high school attendance could not only result in great psychological harm to Amish children, but would also ultimately result in the very destruction of the Amish church community. *Id.* at 212. Analogous testimony in this case was notably absent.

However, even an indirect burden upon one's religious beliefs may make a statute constitutionally infirm unless the statute meets a compelling state interest. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

B. North Dakota has a Compelling State Interest in the Education of its Citizens.

In *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), the Supreme Court emphasized the magnitude of the states' interest in the education of its citizens:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be

> expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Supreme Court confirmed the power of states to insist that children receive a minimum number of hours of instruction, from teachers with specified training, covering prescribed subjects of instruction. "Indeed, the state's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters* (citation omitted): 'If the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.' " *Id.* at 246-47.

It is clear that the State of North Dakota has a compelling state interest in assuring that its citizens are adequately educated. The Melins do not contend otherwise.

C. Teacher Certification is the Least Restrictive Means Now Available to Assure Quality Education of North Dakota's Children.

In North Dakota, the Superintendent of Public Instruction is given the authority and has the duty to determine the criteria for teacher certification based upon considerations of character, adequate educational preparation, and general fitness to teach in the public schools of this state. N.D.C.C. § 15-36-01. The requirements for certification of teachers in North Dakota involve gaining expertise in a particular substantive field, taking classes

in a program of general education, and student teaching. *See* N.D. Admin. Code § 67-02-02-02. These requirements are clearly aimed at and closely related to the goal of producing competent teachers. To the extent that teacher certification furthers education, it serves to satisfy the state's compelling interest. *Sheridan Road Baptist v. Department of Education*, 396 N.W.2d 373, 381 (Mich. 1986), *cert. denied*, 107 S. Ct. 2183 (1987).

It is admitted that a teaching certificate does not guarantee that the holder is a competent teacher. However, a certificate does guarantee that the holder has been exposed to the knowledge that a competent teacher should have. *State v. Patzer*, 382 N.W.2d 631, 639 (N.D.), *cert. denied*, 107 S. Ct. 99 (1986).

The Melins argue that a less restrictive alternative to teacher certification exists but they do not specify just what that alternative is. They argue that compulsory attendance laws in other states do not uniformly require teacher certification for all home schooling parents. However, they gloss over the fact that many of those statutes require "equivalent instruction" or "comparable instruction" as determined by local educational bodies. Many of these statutes have been challenged as unconstitutionally void for vagueness. *Jeffery v. O'Donnell*, ___ F. Supp. ___ (M.D. Pa. 1988); *Ellis v. O'Hara*, 612 F. Supp. 379 (D. Mo. 1985); *Bangor Baptist Church v. State of Maine*, 549 F. Supp. 1208 (D. Me. 1982).

Having local or state officials make subjective evaluations of parents' ability or lack of ability to teach their own children is arguably a more restrictive and intrusive

method of gauging the qualifications of parents as educators than North Dakota's teacher certification requirement. *State v. Patzer*, 382 N.W.2d 631, 638-39 (N.D.), *cert. denied*, 107 S. Ct. 99 (1986).

Even if North Dakota's compulsory attendance law is more restrictive than the laws of other states, it does not follow that the law is constitutionally infirm. To follow the Melins' rationale, if North Dakota's law were struck down because it is more restrictive than the law of other states, then another state would suddenly become the state with the most restrictive law and then that law, too, would be unconstitutional. In turn, each state's law would be struck down. Extended to its logical conclusion, this argument would invalidate any law which attempted to regulate the conduct of citizens who claimed the statute violated their freedom to exercise their religion. We are well advised to heed the admonition of Justice Blackmun to avoid that "slippery slope" which the Melins invite us to climb. "And, for me, 'least drastic means' is a slippery slope and also the signal of the result the court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 189 (1979) (Blackmun, J., concurring).

Teaching does not come naturally to a person any more than practicing medicine or law. Preparation to teach is crucial. "Courses in child psychology, how children learn, various methods of conveying information and developing the learning process and a knowledge of

the subject matter will prepare a person to be a better teacher . . . . This kind of knowledge is essential if one is to become a good teacher." *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 493 (8th Cir. 1987).

The Melins are indisposed to acquire the tools necessary to practice their home schooling craft, not for religious reasons, but because it would be inconvenient for them to do so. The Melins are equally indisposed to procure the services of one who possesses the necessary qualifications. Balancing the centrality of Melins' religious beliefs, which are only slightly and indirectly burdened by the teacher certification requirement, against North Dakota's compelling interest in certification as a means of insuring quality education for its children, the balance clearly favors the state.

CONCLUSION

The appeal by the State of North Dakota of a county judge's dismissal of a criminal complaint did not violate the double jeopardy clause of the fifth amendment. North Dakota's compulsory attendance law, as applied to the Melins, was constitutional. For these reasons, this Court should deny the Melins' petition for writ of certiorari.

Dated this 14 day of October, 1988.

Respectfully submitted,

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